U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Aug2001

Case No. 2000-LHC-2466

OWCP No. 5-108491

In the Matter of

JOHN D. TUCKER,
Claimant
v.

VIRGINIA INTERNATIONAL TERMINALS, INC.,
Employer

SIGNAL MUTUAL INSURANCE CO.
ABERCROMBIE, SIMMONS & GILLETTE OF VIRGINIA,
Carrier

Appearances:
Chanda Wilson, Esq., for Claimant
R. John Barrett, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for compensation filed by John D. Tucker (Claimant), against Virginia International Terminals, Inc. (Employer) for an injury that allegedly occurred in the course of his employment covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (Hereinafter "the Act").

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. The formal hearing was held before the undersigned Administrative Law Judge on February 2, 2001, in Newport News, Virginia (Tr at 1).[1] Claimant submitted sixteen exhibits, CX-1- CX-16, which were admitted without objection. (*Id* at 7, 32.) Employer submitted fifteen exhibits, EX-1- Ex 15, which were admitted without objection. (*Id* at 8). The record was held open for 60 days for briefs. Employer submitted a post-hearing brief on April 4, 2001. Claimant submitted a post-

[1] EX - Employer's exhibit; CX- Claimant's exhibit; TR - Transcript of February 2, 2000 hearing.

hearing brief on April 5, 2001.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The disputed issues presented at the hearing were:

1. Whether Claimant's treatment by Dr. James Allen was properly authorized in accordance with the procedures outlined by the Act and its implementing regulations;

2. Whether Claimant's medical treatment by Dr. James Allen was causally related to his work injury of February 24, 2000;

3. Whether Claimant is entitled to temporary total disability for the period from May 4, 2000 through May 21, 2000 and from June 2, 2000 through December 13, 2000.

STIPULATIONS

At the hearing, the parties submitted written stipulations of fact as follows (Jx 1):

1. That Claimant sustained a work-related accident on February 24, 2000;

2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That an employer/employee relationship existed at all relevant times;

4. That the Claimant filed a timely claim for benefits under the Act;

5. That the Claimant gave timely notice of his injury to the Employer;

6. That the Employer filed a timely notice of controversion;

7. That Claimant's average weekly wage is $976.62 which yields a compensation rate of $651.08.

I have reviewed the stipulations of fact and find that they are supported by substantial evidence in the record. Accordingly, they are adopted as my findings of fact.

DISCUSSION

Presumption of § 20(a)

Section 20(a) of the Act provides Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

Once this *prima facie* case is established, a presumption is created under § 20(a) that the employee's injury or death arose out of employment, and the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

In the instant case, the parties stipulated, "That Claimant sustained a work-related accident on February 24, 2000." (See stipulation 1.) Since the parties have stipulated that an accident occurred at work Claimant need only establish a harm and that his work-related accident could have caused that harm in order to make his *prima facie* case.

The term "harm" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 615, *rev'g, Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

In this case, there actually appear to be two "harms" alleged.[2] One is a herniated disk, and the other is a cyst found during Dr. Allen's surgery. Claimant asserts that the evidence indicates that both harms were work related. (Claimant's brief at 20.)

[2] Claimant also injured his ankle during the injury; however, Claimant's ankle injury is not at issue in this Decision.

Dr. Thomas Stiles, a board certified orthopedic surgeon, (Cx 13c), examined Claimant on March 2, 2000. He testified in his deposition that this exam revealed tenderness in Claimant's lower dorsal and upper lumbar area with pain radiating into both flanks. Dr. Stiles says Claimant was tender to palpitation in his back and suffered pain in his right ankle and right foot and was mildly swollen in both areas. (Cx 13f.) Dr. Stiles states that he saw Claimant again on March 6. (*Id*.) At this time, Claimant brought x-rays which revealed no evidence of any fracture of the lumbar vertebrae, although they did show considerable narrowing of the L5-S1 space. (Cx 13g.) Dr. Stiles recommended an MRI because he felt the pain Claimant was experiencing was either a ruptured disk or a fracture that did not show up on the x-rays. (Cx 13h.)

On March 13, 2000, Claimant underwent an MRI of his lumbar spine. (Ex 6.1; Cx 3.) The interpreting physician, Dr. Charles Hecht-Leavitt,[3] found that, at the L5-S1, disk height was preserved but that the signal was diminished, indicating dehydration. (Ex 6.1; Cx 3.) Dr. Hecht-Leavitt also noted that there was a small, broadly based central disk bulge or protrusion extending into the epidural fat anterior to the thecal sac between the S1 nerve roots, slightly more prominent on the right, abutting the right S1 nerve root. Dr. Hecht-Leavitt felt that the MRI showed a small broadly based central disk bulge or protrusion touching the right S1 nerve root at the L5-S1 and an L4-5 mild diffuse annular bulging. (Ex 6.1; Cx 3.)

After reviewing the MRI, Dr. Stiles testified that he felt it, "showed that [Claimant] had had a ruptured disk, and his lumbar spine was pressing on his S1 nerve root." (Cx 13 h.) Dr. Stiles thought Claimant might require surgery, so he then referred Claimant to another doctor, Dr. Abbott Byrd, because Dr. Stiles does not perform spine surgery. (Cx 13i.)

Another physician, Dr. James Allen, a board-certified neurosurgeon, examined Claimant on July 26, 2000. (Cx 6a; Cx 12f.) Dr. Allen testified in his deposition that at that time Claimant was complaining of right low back and gluteal pain in the region of the sciatic nerve and the right gluteal muscle, and with pain radiating down the posterior lateral thigh all the way to the calf. (Cx 12 f.) Dr. Allen also testified that Claimant had noticed that if he tried to move his right leg with his knee straight that the pain would substantially increase and that if he bent forward, he would have increasing pain and the pain would go all the way from his calf to his foot. (Cx 12g.)

Dr. Allen's notes from that exam indicate that the only record he had regarding Claimant's previous injury was an MRI, dated March 13, 2000, which showed "a L5/S-1 small, widely based central disk bulge or protrusion, touching the right S-1 nerve root and an L4/L5 mild diffuse annular bulging." (Cx 6a.) Dr. Allen's deposition indicated that he felt the March MRI showed:

> a midline and right herniated disc at the L5-S1. It's what I refer to as a retro ligament herniated disc. That's an extrusion of the disc material. But most likely the posterior longitudinal ligament which is the final barrier and, if you will, is still technically intact but

[3] Dr. Hecht-Leavitt is board - certified in diagnostic radiology according to the American Board of Medical Specialties Who's Certified webpage <http:www.abms.org/newsearch.asp.>

> is stretched beyond it's normal limit and stretched and floppy enough that it touches the nerves and causes some irritations to the nerves.

(Cx 12h.)

Dr. Allen believed Claimant had evidence of an active lumbar radiculopathy in an unspecified location. (Cx 6b.) He noted that Claimant had undergone extensive treatment over the past several months, and, although Dr Allen had no medical records, the report of the MRI done in March was suggestive of a ruptured disk at the L-5/S-1 which may have progressed. (Cx 6b.) Dr. Allen ordered another MRI. (Cx 6c.)

Claimant underwent another MRI on his lumbar spine on August 3, 2000. Dr. Stephen Fink, a board-certified diagnostic radiologist[4], noted disk dessication at L4-5 and L5-S1. (Ex 7.1; Cx 7.) He noted no central stenosis or significant foraminal narrowing, but did note an abnormal area of signal alteration on the lateral recess at L5-S1. (Ex 7.1; Cx 7.) On T1 weighted images, Dr. Fink noted the appearance was typical of a herniated disk with extruded fragment extrinsically compressing the ventral lateral aspect of the thecal sac and laterally displacing the right S1 nerve root. (*Id*.) On T2 weighted images, he stated this becomes bright, having similar if not more signal than adjacent CSF. (*Id*.) Dr. Fink's impression was that the focal area of the signal alteration was L5-S1 on the right. (Ex 7.1: Cx 7.) This most likely represented a focal disk herniation with extruded fragment, although the signal characteristics for disk material was atypical. Dr. Fink thought it could alternatively represent a synovial cyst arising from the adjacent facet joint, but thought this less likely. In either event, he believed something was exerting mass effect on the adjacent thecal sac and nerve root. (Ex 7.1; Cx 7.)

Dr. Allen reviewed the August MRI, and stated that:

> the [August] MRI was different [from the March MRI] in that it showed what I felt at the time was a large extruded disc which means that that posterior longitudinal ligament had then gone on and fragmented or torn completely so that the disc material could move beyond the border of the posterior ligament. And that's what we call an extruded disc or a free disc fragment.

(Cx 12i.)

Dr. Allen testified that he believed this was a natural progression of the initial MRI from March of 2000 in that he had an injury to the ligament and that was the progression of the events. (Cx 12j.) Dr. Allen stated that "it's not a natural thing for us to have that. But with his injury and what I saw in the March MRI, it is not unusual or surprising then to see five months later further progression of that herniated disc," with normal everyday activity. (*Id*.) Dr. Allen scheduled surgery.

Dr. Stiles also reviewed the August, 2000, MRI reports. Dr. Stiles opined that the August MRI showed a protruding or ruptured disk and a mass that "really looks cystic on the x-rays." (Cx 13L.)

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[4] According to the American Board of Medical Specialties Who's Certified webpage <http:www.abms.org/newsearch.asp.>

Dr. Stiles stated that the disk material had protruded out from where it was supposed to be. (*Id.*) When asked whether this was a progression from the earlier MRI in March, Dr. Stiles stated, "Well, I think it was there on the earlier x-ray in March. Maybe it was a little more prominent this time, but not markedly so, but it was there both times as far as I am concerned." (Cx 13m.)

Dr. Allen performed the surgery in question on August 29, 2000. Dr. Allen's operative report states:

> The S1 was not remarkable was seen in a far lateral position. A genous foraminotomy was completed along with a medial facetectomy. Despite the decompression along these areas, the verve root remained in the far lateral position. Therefore, explored medial to the S1 nerve root in the axilla of the root, and there was a bluish hemorrhagic appearing sac. Initially, this looked like an out-pouching of the dura, but the distal end of it was rounded and I was able to separate it off the medial surface of the S1 nerve root into the axilla, and it did not appear to be clearly adherent to the dura. The more cephalad portion of it was adherent to the region of the posterior longitudinal ligament. This small isthmus was transected, and the cystic mass was removed and sent to pathology. This allowed the nerve root to obtain a more medial position. On retracting the S1 nerve root medially, there was clear-cut elevation of the lateral annulus with retroligament herniated disc material in this region. The posterior portion of the lateral annulus was then opened. There was expression of soft disc material. On compressing the ligaments, we were able to move up more of the soft disk herniation. The disk space was then entered, and a complete diskectomy was carried out in routine fashion with pituitary rongeurs and curets.

(Cx 10b.)

Dr. Allen testified that his findings during surgery were,

> an incompetent lateral annulus and a retro ligament herniated disc that was large enough to compromise the neuroforamina. And what that means is that the-- the furthest lateral portion of that posterior longitudinal ligament was stretched beyond its limit to contain that disc material and, subsequently, because it was stretched and the disc material was under it, that ligament was under pressure and taking up space into the neuroforamina, which is the hole the nerve exits, therefore, it puts pressure on the nerve, irritation on the nerve, and that's why [Claimant's] leg hurt[].

(Cx 12k.)

Claimant's physicians, Dr. Stiles and Dr. Allen have both testified that they felt that Claimant suffered from a bulging disk in March and a ruptured disk in August and a cyst. These opinions are supported by the MRI reports of Dr. Hecht-Leavitt and Dr. Fink. Thus, Claimant has established that he has suffered a harm.

In order to successfully invoke the § 20(a) presumption, Claimant must also demonstrate the

existence of working conditions or circumstances that could have caused his injury. *United States Industries/Federal Sheet Metal*, 455 U.S. at 615; *Kelaita*, 13 BRBS at 331. To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. *Kelaita*, 13 BRBS at 331; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

In the instant case, as the parties have stipulated that a work-related accident occurred, the Claimant now needs only show that the accident could have caused his harm (bulging and ruptured disk and cyst), in order to invoke the presumption in § 20(a).

Dr. Allen testified that, in his medical opinion, to a reasonable degree of medical certainty, the herniated disk at the L5-S1 level was related to Claimant's February 24, 2000, work-related accident, given that Claimant was asymptomatic prior to the injury and that he had not re-injured his back since that injury. (Cx 12L.) Dr. Allen also indicated that he believed the need for the surgery he performed in August 29, 2000 was causally related to Claimant's accident. (Cx 12m.) Dr. Allen testified that the disk problem that showed up on the March 13, 2000 MRI was related to the February 24, 2000 work-related accident. (Cx 12m.) He further testified that "with this injury and what I saw in the March MRI, it is not unusual or surprising then to see five months later further progression of that herniated disc." (Cx 12j.)

Dr. Allen also stated, in answer to the question, "Do you have an opinion to a reasonable degree of medical certainty what caused the cyst?", that it would be a tough one to prove, that it was not a vascular malformation, despite what the pathologist said, so he believed it was some type of hemorrhagic event in the area of his disk rupture that got walled off for some reason. (Cx 12q.) He stated that he had never seen anything like it, but he thought it was related. (*Id.*)

Dr. Stiles agreed as to the disk, stating that in his medical opinion to a reasonable degree of medical certainty, he believed the herniated disk that was present on August 3, 2000 MRI was related to Claimant's work injury. (Cx 13n.)

Claimant has thus offered MRI's as well as the medical opinion of two qualified physicians which state that Claimant suffered a harm in the form of a ruptured disk and a cyst. These same doctors also indicated that his accident could have caused such harm. Thus, I find that Claimant has shown his *prima facie* case, and that the presumption, that Claimant's claim falls within the Act, has been invoked. It is presumed that Claimant's ruptured disk and cyst arose out of his accident at work.

Rebuttal of § 20(a) Presumption

It has been presumed pursuant to § 20(a) that the Claimant's hemorrhagic cyst and ruptured disk were caused by his injury at work. Therefore, the Employer bears the burden of establishing by substantial evidence that the hemorrhagic cyst and ruptured disk were not caused by his injury at work. In support of rebuttal, Employer has offered the opinions of Dr. J. Abbot Byrd and Dr. John A. Williamson. Employer contends that Dr. Byrd and Dr. Williamson believed that Claimant's problems,

as diagnosed by Dr. Allen, were unrelated to his work injury.[5] (*Id* at 12, 13.)

The Claimant was examined by Dr. J. Abbott Byrd, a board certified [6] orthopedic surgeon, on April 19, 2000. (Ex 11.4.) When Dr. Byrd saw him, Claimant was complaining of low back pain going to the inguinal region, his groin, and the left anterior thigh, the front of this left thigh, and his ankle. (*Id*.) On examination, Dr. Byrd found Claimant's reflexes, strength in his legs and his ability to feel were normal. (Ex 11.4.) He thought Claimant's range of motion in his hips and blood flow to his legs were also satisfactory. (Ex 11.4.)

Dr. Byrd testified that he reviewed the March MRI and thought it only showed desiccation or drying out of the L4-5 and L5-S1 disk. (Ex 11.5.) Dr. Byrd stated that the official report of that MRI from Dr. Hecht-Leavitt indicated a small central bulge, but not a piece of disk broken out of the disk space and into the canal free. (Ex 11.17.) Dr. Byrd stated that this, combined with Claimant's complaints of low back pain and anterior left thigh pain led him to believe there was not a clinically symptomatic disk herniation. Dr. Byrd thought Claimant's problem was work injury superimposed upon pre-existing degenerative disease of the L4-5 and L5-S1 disks. (Ex 11.1.7.)

Dr. Byrd saw Claimant again on May 17, 2000. At that time, Dr. Byrd testified that he thought Claimant had the bulging of a disk and drying out of the disk on a degenerative basis and, superimposed upon that, a lumbar strain. (Ex 11.20.) Dr. Byrd felt that the only result of the work injury was a soft tissue injury to the muscles and ligaments around the area. (*Id*.)

After reviewing the MRI taken in August of 2000. Dr. Byrd stated that:

> [t]he MRI from August showed the abnormality on the right side at L5-S1 with a large cystic structure impinging the right S1 nerve root. It also shows the generalized desiccation and drying out at L4/5 and 5/1 with a small bulge. It's a central bulge in the disk at L5/S1.

(Ex 11.8.)

Dr. Byrd testified there were changes from the March MRI to the August MRI, "Yeah. There was definitely change in that the hemorrhagic cyst appeared [.] [T]hat was not present on the March MRI scan, per my notes also per the official report from Dr. Hecht-Leavitt." (Ex 11.8.) Regarding whether the hemorrhagic cyst was caused by the work accident, Dr. Byrd testified,

> I don't believe that it was, no, sir. Again, the work injury occurred in February and the first MR scan was done on March 13th and it certainly did not show the hemorrhagic

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[5] It appears that Claimant has been compensated for his injury up to the point of the treatment by Dr. Allen, thus only the treatment by Dr. Allen and the time Claimant was out of work due to treatment by Dr. Allen are at issue in this case.

[6] This information was obtained from the American Board of Medical Specialties Who's Certified webpage <http:www.abms.org/newsearch.asp.>

> cyst. His complaints at that time were not consistent with the significant pressure from the hemorrhagic cyst that was seen by myself on the August MR scan. So I don't see any indication up through May 17th, when I last saw him, that the work injury caused the hemorrhagic cyst on the right. It certainly was not present, in my opinion, when I last saw him on May 17th.

(Ex 11.11.lines 7-18)

As regards Claimant's surgery, Dr. Byrd felt that the primary reason for Claimant's complaint after reading the operative report was the hemorrhagic cyst. (Ex 11.18.) He testified that once the cyst was removed, the nerve was moved medially allowing visualization of the degenerative disk space where there was a generalized bulge of the annulus, the outer covering of the disk, and Dr. Allen cut away some of that and got to the inside of the disk and pulled out some of the soft disk material. Dr. Byrd stated that there was no indication to him in the operative report that there was a piece of sequestered disk material which had broken out of the disk space itself. Thus, Dr. Byrd believes the findings at surgery, regarding the disks alone, were consistent with his interpretation of the MRI scan in March that it was degenerative and generally bulging. (Ex 11.19.)

Dr. Byrd said that when he saw Claimant for the last time on May 17, 2000, there was no need for back surgery. (Ex 11.10-11.) Dr. Byrd also stated that Claimant's complaints at the time of the injury were not consistent with the significant pressure for the hemorrhagic cyst that was seen on the August MRI, so Dr. Byrd saw no indication through May 17 that the work injury caused the hemorrhagic cyst on the right. (Ex 11.11.)

Dr. John A. Williamson, a board certified orthopedic surgeon, (Ex 12.4), examined Claimant on March 20, 2000. Dr. Williamson stated that Claimant was complaining of pain in his lower back, both on the left and right side, although more significant on the right pain radiating down his left leg to his anterior thigh, and down both knees. (Ex 12.5.) Claimant stated that his back and leg pain was worse when he sat or stood too long and was better when he rested. (Ex 12.6.) On examination, Dr. Williamson noted that Claimant could bend to the right and left 30 degrees and could extend 30 degrees and could bend forward at the waist 90 degrees, all of which is normal. (Ex 12.6.) Dr. Williamson stated that Claimant was able to lift his foot up, crossing his legs to show Dr. Williamson where his ankle pain was, which put stress on the lower back. (*Id*.) Dr. Williamson felt that this was significant because it showed Claimant was able to get into more difficult positions, which people with bad back pathology, i.e. ruptured disks, aren't able to do. (Cx 12.6-7.) Dr. Williamson stated that Claimant's exam, other than some tightness, was entirely normal, so he diagnosed a back strain, "more by what his history was because not much will show up on a physical exam." (Ex 12.7.) Dr. Williamson opined that Claimant would reach maximum medical improvement in four weeks based on the fact that a severe tissue injury will heal in six to eight weeks. (Ex 12.8.)

On March 20, 2000, Dr. Williamson indicated that Claimant could return to work as a Hustler driver if he took breaks every 15 minutes. Dr. Williamson received the March MRI report on March 23, 2000, which Dr. Williamson felt showed some degenerative disk disease at the L5/S1 with minimal disk bulging. (Ex 12.10-11.) Although Dr. Williamson did not remember the MRI independently, he

did not feel any of the degenerative changes or dessication shown on the March MRI were related to the work injury of February 24, 2000. (Ex 12.11.)

Dr. Williamson also reviewed the August MRI, which he felt showed a large ruptured disk at the L5/S1 on the right and which was not present when he examined Claimant in March, 2000. (Ex 12.13.) Dr. Williamson stated that within a medical probability, the ruptured disk that was shown on the August MRI and that subsequently led to surgery, was not caused or related to the February 24 work injury. (Ex 12.15.) Dr. Williamson based this opinion on the fact that the ruptured disk did not match Claimant's history, his physical findings, or his MRI scan taken one month after the injury and the fact that the problems did not take place within a reasonable time frame of the injury. (Ex 12.15 and 12.21.) Dr. Williamson also stated that a hemorrhagic cyst is not a normal consequence that would be expected of a ruptured disk. (Ex 12.15.) He stated that these cysts are not normally associated with a ruptured disk. (*Id*.)

In considering the reports of Dr. Byrd and Dr. Williamson, it is clear that both physicians did not believe that the Claimant's ruptured disk was not present in March 2000, when the first MRI was done. This is substantial evidence, which could be accepted by a reasonable person, as establishing that the Claimant did not have a ruptured disk in March of 2000. As to the hemorrhagic cyst, Dr. Byrd testified that the March MRI did not show the cyst. Dr. Williamson stated that a hemorrhagic cyst is not a normal consequence that would be expected of a ruptured disk. (Ex 12.15.) This is substantial evidence, which could be accepted by a reasonable person, as establishing that the Claimant did not have the hemorrhagic cyst in March of 2000.

However, neither Dr. Byrd nor Dr. Williamson address the cause of the ruptured disk or the hemorrhagic cyst, which they both agree is manifested by the time of the August MRI. While it is not necessary (in order to rebut the presumption) for the Employer to offer evidence of what did cause the ruptured disk or the hemorrhagic cyst, the Employer must rule out a causal relationship between the work injury and these conditions. While Dr. Williamson does opine that a hemorrhagic cyst is not a **normal** (emphasis added) consequence that would be expected of a ruptured disk, he does not rule out a causal relationship between the work accident and the cyst or the ruptured disk. Further, Dr. Byrd testified that he thought Claimant's problem was a work injury superimposed upon pre-existing degenerative disease of the L4-5 and L5-S1 disks. (Ex 11.1.7.) Dr. Byrd does not address whether the Claimant's work injury aggravated the pre-existing degenerative disease causing it to progress to a rupture, and does not say whether the cyst could have been caused by the work injury.

Upon consideration of the opinions of Dr. Byrd and Dr. Williamson, I find that they do not constitute substantial evidence that the Claimant's hemorrhagic cyst was not caused by the work injury, nor that the Claimant's injury did not aggravate his pre-existing degenerative disk disease. As such, I find that the presumption of § 20(a), that the Claimant's hemorrhagic cyst and ruptured disk were caused by his injury at work, has not been rebutted.

Therefore, I find that the Claimant is entitled to compensation for temporary total disability for the period from May 4, 2000 through May 21, 2000 and from June 2, 2000 through December 13,

2000.

Authorization for Treatment by Dr. Allen

Employer has also disputed whether it should be responsible for payment of medical expenses for his surgery and treatment by Dr. James Allen. As grounds for this argument, Employer contends that the Claimant made his initial choice of physicians, choosing Dr. Stiles, and that Dr. Stiles referred him to Dr. Byrd. Further, Employer argues that the Claimant, after seeing Dr. Byrd, then returned to his primary care physician, Dr. Sutton, who made the referral to Dr. Allen. Thus, Employer argues that it did not authorize the change of physicians from Drs. Stiles and Byrd, to Drs. Sutton and Allen. As such, the Employer argues that under § 7(c)(2) of the Act and 20 C.F.R. § 702.406, it is not responsible for the payment of medical benefits for treatment and surgery by Dr. Allen.

The Claimant argues that Dr. Byrd told him to see his primary care doctor, that there was nothing more he could do for him, and that Dr. Byrd said nothing about returning to Dr. Stiles. (Claimant's brief at 5, citing Tr. 17-19). Dr. Byrd's May 17, 2000 medical note states,

> The patient returns continuing to have low back pain with driving. He is tender in the lumbar spine. Motors and sensation are intact.
>
> The situation is discussed with the patient. He notes that he is going to try to work at another terminal where the job won't be quite as physical as the present one. He is told in my opinion, he may work with 25 pound lifting, limited bending restrictions. I will not see him again. A conference was had with Ms. Clegar[7] and she is agreeable.

CX 4(d).

The Claimant testified that the Employer had stopped paying workers' compensation benefits on May 1, 2000 (Tr. 27), and that Dr. Byrd had told him to go see his primary physician. He acknowledges that the did not get authorization from the Employer to change physicians as he was not getting paid workers' compensation benefits and "Y'all [Employer] were saying it wasn't no more of your problem so I had to do what I had to do to get the pain to go away." (Tr. 27).

Employer submitted the deposition of Dr. Byrd, in which he was asked about the office note that said "I will not see him again." (EX 11.15, line 10). Dr. Byrd testified that such was communicated to the Claimant, but that it was his (Dr. Byrd's) understanding that if the Claimant had problems, he was to come back. The Claimant's testimony (which I found to be credible), that Dr. Byrd told him to go to see his primary care doctor (Tr. 17), is clearly inconsistent with Dr. Byrd's understanding of what the Claimant was to do if he had further problems.

When asked whether the Claimant would have been given information from either he (Dr. Byrd) or somebody in his office to follow up with his primary care physician, Dr. Byrd testified,

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[7] Counsel for Employer stipulated that Ms. Clegar is a representative of the insurance adjuster (Tr. 32).

A. Usually not, you know, because with the injured worker usually the treating physician has to be the one providing the care because it's not authorized, as I understand the situation. So usually we don't tell them to follow with the primary care.

Q. Okay. So that wouldn't have come from your office?

A. It usually doesn't. I can't recall whether it did or not in this time period. Usually, though, the primary care physicians don't want to follow the work injured patient. (EX 11.15-11.16).

Upon consideration of this evidence, I find that the statement by Dr. Byrd does not specifically contradict the Claimant's credible testimony that Dr. Byrd told him to see his primary care physician. Therefore, I find that Dr. Byrd did, in fact, convey to the Claimant that he would not see him again, and that he should see his primary care physician. This, in effect, is a referral by Dr. Byrd to the Claimant's primary care physician.

Further, even, if Dr. Byrd did not tell the Claimant to see his primary care physician, I find that the Claimant was effectively discharged from further treatment by Dr. Byrd when he said "I will not see him again." Thus, the Claimant did not change physicians without the Employer's consent. Instead the Claimant sought treatment on his own only after Dr. Byrd discharged him from his care, indicating that he should return to work despite continuing pain. See, *Atlantic and Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971) and *Walker v. AAFES*, 5 BRBS 500 (1977).

Accordingly, I find that the Claimant's treatment by Dr. Allen and surgery are compensable medical expenses under the Act.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Virginia International Terminals, is hereby ordered to pay to Claimant, compensation for temporary total disability for the period from May 4, 2000 through May 21, 2000 and from June 2, 2000 through December 13, 2000, at the rate of $651.08 per week;

2. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries, including treatment and surgery by Dr. James Allen;

3. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

4. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A
RICHARD E. HUDDLESTON
Administrative Law Judge